In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 591

PACIFIC NATIONAL BANK OF SAN FRANCISCO (a national banking association), et al.,
Petitioners,

vs.

MERCED IRRIGATION DISTRICT,
Respondent.

PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Come now the petitioners herein, PACIFIC NATIONAL BANK OF SAN FRANCISCO, a national banking association, MARY E. MORRIS, R. D. CROWELL, BELLE CROWELL, MINNIE E. RIGBY as Executrix and RICHARD TUM SUDEN as Executor of the Last Will of William A. Lieber, Alias, Deceased, MILO W. BEKINS and REED J.

Bekins as trustees appointed by the Will of Martin Bekins, Deceased, Milo W. Bekins and Reed J. Bekins as trustees appointed by the Will of Katherine Bekins, deceased, Reed J. Bekins, Cooley Butler, Chas. D. Bates, Lucretia B. Bates, Edna Bicknell Bagg, John D. Bicknell Bagg, Mary B. Cates, Nancy Bagg Eastman, Charles C. Bagg, Horace B. Cates, Barker T. Cates, Mary Edna Cates Rose, Mildred C. Stephens, N. O. Bowman, W. H. Heller, Fannie M. Dole, James Irvine, J. C. Titus, Sam J. Eva, William F. Booth, Jr., George N. Keyston, George W. Pracy, H. T. Harper and George B. Miller as trustees of Cogswell Polytechnical College, Tulocay Cemetery Association, a corporation, Percy Griffin, Emogene Cowles Griffin, D. Lyle Ghirardelli, A. M. Kidd, Grayson Dutton, Stephen H. Chapman, Edith O. Evans, J. Ofelth, Dante Muscio, I. M. Green, Julia Sunderland, Lily Sunderland, Florence S. Ray, Joseph S. Ray, Amelia Kingsbaker, S. Lachman Company, a corporation, Sue Lachman, Sophia MacKenzie, Nettie MacKenzie, R. J. McMullen, Gilbert Moody, William Payne, G. H. Pearsall, Sherman Stevens, E. G. Soule, Margaret B. Thomas, Isabella Gillett and Effie Gillett Newton as executrices of the Estate of J. N. Gillett, deceased, Theo. F. Theime, Fletcher G. Flaherty, Frances V. Wheeler, Miriam H. Parker, Apphia Vance Morgan, First National Bank of Pomona, George F. Covell, Alma H. Woore, George Habenicht, Seth R. Talcott, Adolph Aspegren, J. H. Fine, Mrs. J. H. Fine, F. F. G. Harper, W. S. Jewell, Florence Moore, American Trust Company

as trustee under a certain agreement between R. S. Moore and American Trust Company dated December 15, 1927, CROCKER FIRST NATIONAL BANK as trustee under a certain agreement between Florence Moore and Crocker First Federal Trust Company, dated December 15, 1937, and present this, their petition for a rehearing of the Petition for a Writ of Certiorari herein, and in support thereof respectfully show:

Although the debtor District has corporate assets (bought with the bondholders' money) worth more than two and one-half times the amount offered by the plan of debt readjustment, as its own records show;

Although the lands in the District, which are subject to taxation for the debt, have a market value more than four times the amount offered by the plan, as is shown by the testimony of the District's own and only witness on value produced at the trial;

Although most, if not all of these petitioners paid approximately par for their bonds, under a contract whereby the bonds are secured by the lands in the District, which lands are "impressed with a trust" to pay the bonds and "can never be permanently released from the obligation of the bonds until they are paid" (12 Cal. (2d) 365);

Although the District owns a hydro-electric plant (bought with the bondholders' money) from which it derives an assured income more than sufficient to discharge the proposed refunding bonds, without any contribution from the landowners whatsoever;

Although under express provisions of the California Statutes, the District is empowered to convey its corporate properties to its bondholders in satisfaction of the bonds, to be operated by them as a public utility bound to serve all indifferently at reasonable rates;

Although the District's average annual income from assessments during its entire life (since its creation in 1919), plus average annual power revenue, has been enough to amortize, in 35 years at 4% (the terms of the refunding bonds proposed by the plan), a debt more than twice the amount offered by the plan;

Although no evidence even suggests that the District's future income will be less than its past income, but on the contrary the evidence indicates a future income much larger than that of the past;

Although the plan approved below was carried through by a committee led by a bondholder who was also a large landowner in the District and who also held a very large amount of debts secured by mortgages on lands therein;

Although years before this proceeding was commenced, and indeed before enactment of the statute on which it rests, the District (as we submit) became the beneficial owner of all the bonds purportedly consenting to the plan herein, all of which are held in pledge by Reconstruction Finance Corporation;

Although the Court below, while classifying Reconstruction Finance Corporation as a creditor of the same class as objecting bondholders for voting purposes, nevertheless denied objecting bondholders five

years' interest at 4% paid to Reconstruction Finance Corporation, the only consenting bondholder;

Although a previous judgment in favor of these petitioners against the District denied the identical relief here sought, applying the rule then existing that these bonds are immune under the Constitution from being scaled down by a federal bankruptcy Court;

Notwithstanding all this, the Court below confirmed the plan, scaling down the District's bonded debt (its other debts are inconsiderable) to approximately 37% of the amount thereof, and in so doing contradicted this Court's views on the subject of what is a fair plan under statutes like this, the doctrine of *res judicata*, and other rules discussed in our brief herein.

Not all of the matters enumerated above appear in the opinions below. As to those which do not, we submit that the opinions constitute a variety of unfairness which this Court should not condone, but should declare to be a departure from the accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision.

The Congress has not enacted a policy that the public welfare will be subserved by radical curtailment of debts regardless of ability to pay.

The Congress has not enacted a policy that the public welfare will be subserved by relieving debtors of their debts even though the security pledged therefor exceeds the amount thereof. On the contrary, under the principles announced by this Court in *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106,

the Congress, by requiring that the plan be "fair", enacted that no plan scaling down debts shall be approved where the available assets of the debtor exceed the amount offered by the plan. *A fortiori,* the statute says, no plan scaling down debts shall be approved where, as here, the property pledged as security for the debt exceeds the amount of the debt in question, and is several times the amount offered by the plan.

Under submission, we believe that the most elementary principles of common honesty forbid approval of the plan here involved. We submit that departure from those principles is not in the public interest.

If the picture painted in the brief for respondent herein were a fair statement of the case, it is conceivable that this Court might believe that the landowners in Merced Irrigation District could not pay the amount of the District's debts out of income from the lands in the District, that recourse to the security, i. e., to those lands, might therefore be necessary to pay the debts in question, and that this would be undesirable. The simple fact is, however, that no such situation is presented, as we show in our brief.

Moreover, the decision in this case has been awaited by both bench and bar, because it raised, and called for discussion of, substantially all of the important questions of law, policy and administration presented by the Municipal Bankruptcy Act. In our brief we attempt to show that several statements and implications in the opinion below call for correction and clarification by this Court.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that a Writ of Certiorari be issued out of and under the seal of this Honorable Court as prayed for in the petition for Writ of Certiorari herein.

Dated, January 21, 1941.

Respectfully submitted,

HERMAN PHLEGER,
PETER TUM SUDEN,
W. COBURN COOK,
Counsel for Petitioners.

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NEWELL J. HOOEY,
CLARK, NICHOLS & ELTSE,
GEORGE CLARK,
CHASE, BARNES & CHASE,
LUCIUS F. CHASE,
DAVID FREIDENRICH,
BROBECK, PHLEGER & HARRISON,
Of Counsel.

CERTIFICATE OF COUNSEL.

We, Herman Phleger, Peter tum Suden and W. Coburn Cook, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Dated, January 21, 1941.

HERMAN PHLEGER,
PETER TUM SUDEN,
W. COBURN COOK,
Counsel for Petitioners.